

FY 2010 NDAA Section 821 Legis History

PART I – What Came Out of the Legislative Process:

Conf Report (H.Rpt 111-288, 10/07/2009):

SEC. 821. AUTHORITY FOR GOVERNMENT SUPPORT CONTRACTORS TO HAVE ACCESS TO TECHNICAL DATA BELONGING TO PRIME CONTRACTORS.

(a) **AUTHORITY FOR ACCESS TO TECHNICAL DATA.**—Subsection (c) of section 2320 of title 10, United States Code, is amended—

- (1) in paragraph (1), by striking “or” at the end;
- (2) by redesignating paragraph (2) as paragraph (3); and
- (3) by inserting after paragraph (1) the following new paragraph (2):
“(2) notwithstanding any limitation upon the license rights conveyed under subsection (a), allowing a covered Government support contractor access to and use of any technical data delivered under a contract for the sole purpose of furnishing independent and impartial advice or technical assistance directly to the Government in support of the Government’s management and oversight of the program or effort to which such technical data relates; or”.

(b) **COVERED GOVERNMENT SUPPORT CONTRACTOR DEFINED.**— Such section is further amended by adding at the end the following new subsection:

“(f) In this section, the term ‘covered Government support contractor’ means a contractor under a contract the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government’s management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), which contractor—

“(1) is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

“(2) executes a contract with the Government agreeing to and acknowledging—

“(A) that proprietary or nonpublic technical data furnished will be accessed and used only for the purposes stated in that contract;

“(B) that the covered Government support contractor will enter into a non-disclosure agreement with the contractor to whom the rights to the technical data belong;

“(C) that the covered Government support contractor will take all reasonable steps to protect the proprietary and nonpublic nature of the technical data furnished to the covered Government support contractor during the program or effort for the period of time in which the Government is restricted from disclosing the technical data outside of the Government;

“(D) that a breach of that contract by the covered Government support contractor with regard to a third party’s ownership or rights in such technical data may subject the covered Government support contractor—

“(i) to criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

“(ii) to civil actions for damages and other appropriate remedies by the contractor or subcontractor whose technical data is affected by the breach; and

“(E) that such technical data provided to the covered Government support contractor under the authority of this section shall not be used by the covered Government support contractor to compete against the third party for Government or non-Government contracts.”.

* * *Explanatory Notes * *

Authority for Government support contractors to have access to technical data belonging to prime contractors (sec. 821)

The Senate amendment contained a provision (sec. 821) that would authorize the Department of Defense (DOD) to provide access to technical data delivered under a DOD contract to a support contractor providing advice and assistance to the government. The House bill contained no similar provision. The House recedes with an amendment that would: (1) delete the criminal penalties for disclosure of information; and (2) require the support contractor to agree to enter into a non-disclosure agreement with the contractor to whom the technical data rights belong. This modification would result in civil enforcement, rather than criminal enforcement, for violations of the non-disclosure requirements in the provision.

* * * *End-Conf-Rpt

PART II – What Went In to the Legislative Process:

S. 1390 Public Print (printed 7/24 as passed by Senate 7/23; note, this is unchanged from version placed on calendar in Senate);

SEC. 821. AUTHORITY FOR GOVERNMENT SUPPORT CONTRACTORS TO HAVE ACCESS TO TECHNICAL DATA BELONGING TO PRIME CONTRACTORS.

(a) Authority-

(1) ACCESS TO TECHNICAL DATA- Subsection (c) of section 2320 of title 10, United States Code, is amended--

(A) in paragraph (1), by striking `or' at the end;

(B) by redesignating paragraph (2) as paragraph (3); and

(C) by inserting after paragraph (1) the following new paragraph (2):

`(2) notwithstanding any limitation upon the license rights conveyed under subsection (a), allowing a covered Government support contractor access to and use of any technical data delivered under a contract for the sole purpose of furnishing independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of the program or effort to which such technical data relates; or'.

(2) COVERED GOVERNMENT SUPPORT CONTRACTOR DEFINED- Such section is further amended by adding at the end the following new subsection:

`(f) In this section, the term 'covered Government support contractor' means a contractor under a contract the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), which contractor--

`(1) is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

`(2) executes a contract with the Government agreeing to and acknowledging--

`(A) that proprietary or nonpublic technical data furnished will be accessed and used only for the purposes stated in that contract;

`(B) that a breach of that contract by the covered Government support contractor with regard to a third party's ownership or rights in such technical data may subject the covered Government support contractor--

`(i) to criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

`(ii) to civil actions for damages and other appropriate remedies by the contractor or subcontractor whose technical data is affected by the breach;

`(C) that such technical data provided to the covered Government support contractor under the authority of this section shall not be used by the covered Government support contractor to compete against the third party for Government or non-Government contracts; and

`(D) that any breach of the nondisclosure obligations under subparagraphs (A) through (C) may constitute a violation of section 1905 of title 18.'

(b) Criminal Penalty- Section 1905 of title 18, United States Code, is amended by inserting 'or being an officer, agent, or employee of a private sector organization having a contractual nondisclosure agreement under the authority of section 2320(f)(2) of title 10,' after 'Antitrust Civil Process Act (15 U.S.C. 1311-1314),'.

S.Rpt. 111-035 to accompany S.1390 (7/02/2009):

Authority for government support contractors to have access to technical data belonging to prime contractors (sec. 821)

The committee recommends a provision that would authorize the Department of Defense (DOD) to provide access to technical data delivered under a DOD contract to a support contractor, to

enable the support contractor to furnish independent and impartial advice or technical assistance to DOD in support of DOD's management and oversight of the contract. The provision requires the support contractor to make a series of commitments, including exposure to criminal, civil, administrative, and contractual penalties, to ensure that such access is not abused.

PART III – What's the Difference?

Below is a COMPARE showing how Section 821 from Conf Report – as passed and included in public law 110-084 revised the original 821 as passed by Senate (S.1390)

SEC. 821. AUTHORITY FOR GOVERNMENT SUPPORT CONTRACTORS TO HAVE ACCESS TO TECHNICAL DATA BELONGING TO PRIME CONTRACTORS.

(a) *Authority-*

~~(1) ACCESS TO TECHNICAL DATA~~ for Access to Technical Data- Subsection (c) of section 2320 of title 10, United States Code, is amended--

(A) in paragraph (1), by striking 'or' at the end;

(B) by redesignating paragraph (2) as paragraph (3); and

(C) by inserting after paragraph (1) the following new paragraph (2):

`(2) notwithstanding any limitation upon the license rights conveyed under subsection (a), allowing a covered Government support contractor access to and use of any technical data delivered under a contract for the sole purpose of furnishing independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of the program or effort to which such technical data relates; or'.

~~(2) COVERED GOVERNMENT SUPPORT CONTRACTOR DEFINED~~ b) Covered

Government Support Contractor Defined- Such section is further amended by adding at the end the following new subsection:

`(f) In this section, the term 'covered Government support contractor' means a contractor under a contract the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), which contractor--

(1) is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(2) executes a contract with the Government agreeing to and acknowledging--

(A) that proprietary or nonpublic technical data furnished will be accessed and used only for the purposes stated in that contract;

(B) that the covered Government support contractor will enter into a non-disclosure agreement with the contractor to whom the rights to the technical data belong;

(C) that the covered Government support contractor will take all reasonable steps to protect the proprietary and nonpublic nature of the technical data furnished to the covered Government support contractor during the program or effort for the period of time in which the Government is restricted from disclosing the technical data outside of the Government;

(D) that a breach of that contract by the covered Government support contractor with regard to a third party's ownership or rights in such technical data may subject the covered Government support contractor--

(i) to criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

(ii) to civil actions for damages and other appropriate remedies by the contractor or subcontractor whose technical data is affected by the breach; and

(E) that such technical data provided to the covered Government support contractor under the authority of this section shall not be used by the covered Government support contractor to compete against the third party for Government or non-Government contracts; and

~~(D) that any breach of the nondisclosure obligations under subparagraphs (A) through (C) may constitute a violation of section 1905 of title 18. '~~

~~(b) Criminal Penalty—Section 1905 of title 18, United States Code, is amended by inserting 'or being an officer, agent, or employee of a private sector organization having a contractual nondisclosure agreement under the authority of section 2320(f)(2) of title 10,' after 'Antitrust Civil Process Act (15 U.S.C. 1311-1314);'~~

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